No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,
Appellants,

v.

RALPH GINGLES, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

WILLIAM T. LAKE
Counsel of Record
ADRIENNE MASTERS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amicus Curiae
Common Cause

August 30, 1985

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION FOR LEAVE TO FILE BRIEF	vii
INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT	1
I. THE 1982 AMENDMENT TO THE VOTING RIGHTS ACT EXPRESSED CONGRESS' INTENT TO REMEDY DILUTION OF RACIAL MINORITY VOTING STRENGTH CAUSED BY THE CONTINUING EFFECTS OF PAST DISCRIMINATION	4
II. SECTION TWO'S ASSURANCE OF EQUAL "OPPORTUNITY" FOR RACIAL MINORITIES TO "ELECT REPRESENTATIVES OF THEIR CHOICE" REQUIRES CONSIDERATION OF A GROUP'S DIRECT VOTING STRENGTH AND OF ITS ABILITY TO PARTICIPATE EFFECTIVELY IN COALITION POLITICS	7
A. Section Two Is Designed to Protect the Voting Strength of Minorities as a Group	7
B. The Factors Identified in the Legislative History Address the Ability of Racial Minorities to Exercise Direct Voting Strength and to Build Coalitions to Influence Elections in the Absence of Numerical Majorities	9
III. THE LAWFULNESS OF A CHALLENGED PRACTICE SHOULD BE DETERMINED ON THE BASIS OF ITS IMPLICATIONS FOR THESE TWO MEANS OF INFLUENCING ELECTORAL OUTCOMES	13

TABLE OF CONTENTS—Continued

Page

A. A Single-Member Districting Scheme That "Fractures" or "Packs" a Racial Group's Direct Voting Strength Should Be Unlawful Unless Other Factors Indicate That the Group Can Participate Effectively in the Coalition-Building Process 13

B. Multimember Districts That Subsume Large Minority Populations Dilute the Direct Voting Power of Such Groups and Should Be Closely Scrutinized 18

1. Multimember Districts Inherently Dilute the Direct Voting Strength of Minorities.. 18

2. The Need for Proof of Racial Polarization or Other Factors Impairing a Minority's Ability to Build Coalitions Should Be Less Where Concentrations of Minority Voters are Subsumed in Multimember Districts 22

IV. APPLYING THESE PRINCIPLES, THE COURT SHOULD AFFIRM THE JUDGMENT BELOW 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES:

Page

Burns v. Richardson, 384 U.S. 73 (1966) 14
Chapman v. Meier, 420 U.S. 1 (1975) 20
City of Mobile v. Bolden, 446 U.S. 55 (1980) 4, 16, 19, 22
City of Rome v. United States, 446 U.S. 156 (1980) 10, 21
Connor v. Finch, 431 U.S. 407 (1977) 19, 20
Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976)..... 22
Fortson v. Dorsey, 379 U.S. 433 (1965) 19
Gaffney v. Cummings, 412 U.S. 735 (1973) 8
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 14
James v. City of Sarasota, No. 79-1031-Civ-T-GC (D.C. Fla. Jan. 25, 1985) 22
Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) 5, 12, 19
Karcher v. Daggett, 462 U.S. 725 (1983) 8
Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied sub nom. City Council v. Ketchum*, 105 S. Ct. 2673 (1985) 10, 15
Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977) 12, 15, 16
Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473 (11th Cir. 1984) 12
Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983).. 5, 15
McMillan v. Escambia County, 748 F.2d 1037 (5th Cir. 1984) 7, 15
NAACP, Inc. v. City of Statesville, 606 F. Supp. 569 (W.D.N.C. 1985) 22
NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982) 17
Perkins v. City of West Helena, 675 F.2d 201 (8th Cir.), *aff'd*, 459 U.S. 801 (1982) 15
Reynolds v. Sims, 377 U.S. 533 (1964) 8
Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974) 14
Rogers v. Lodge, 458 U.S. 613 (1982) 12, 15, 19, 21
United States v. Dallas County Commission, 739 F.2d 1529 (11th Cir. 1984) 7
United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984) .....*passim*

TABLE OF AUTHORITIES—Continued

Page

Wallace v. House, 515 F.2d 619 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976) .. 20
Wesley v. Collins, 605 F. Supp. 802 (M.D. Tenn. 1985) 8, 23
Whitcomb v. Chavis, 403 U.S. 124 (1971) 14, 19
White v. Regester, 412 U.S. 755 (1973) .....*passim*
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) .....*passim*

STATUTES:

Pub. L. 97-205 § 3, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973(b) (1982)), *amending* Pub. L. 89-110, 79 Stat. 437 (1965) 4
42 U.S.C. § 1973(b) (1982) 5, 7, 17, 18

LEGISLATIVE MATERIALS:

H.R. Rep. 227, 97th Cong., 1st Sess. (1981) 5, 6, 19-20
S. Rep. No. 417, 97th Cong., 2d Sess. (1982) .....*passim*

PERIODICALS:

Howard and Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983) 21
Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 Fla. St. L. Rev. 85 (1979)..... 18
Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353 (1976) 19, 21
Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689 (1982) 8, 15

TABLE OF AUTHORITIES—Continued

Page

Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 Iowa L. Rev. 1 (1973) 14
Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. Pa. L. Rev. 666 (1972) 19
Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715 (1983) 8
Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973) 21
Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 Yale L.J. 974 (1982) 15-16, 21
Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 Yale L.J. 189 (1984) 6, 8, 16, 17

BOOKS AND MISCELLANEOUS AUTHORITIES:

Avila, *Mobile Evidentiary Analysis*, in *The Right to Vote* (Rockefeller Foundation Conf. Rep. 1981) 18
R. Dahl, *Who Governs?* (1974) 10
Davidson, *Minority Vote Dilution*, in *Minority Vote Dilution* (1984) 21
R. Dixon, *Democratic Representation* (1968)..... 21
E. Lakeman, *How Democracies Vote* (1974)..... 21
R. Morrill, *Political Redistricting and Geographic Theory* (1981) 14
Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *Minority Vote Dilution* (1984) 14
Still, *Alternatives to Single-Member Districts*, in *Minority Vote Dilution* (1984) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, *et al.*,
Appellants,

v.

RALPH GINGLES, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

---

MOTION FOR LEAVE TO FILE BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, Common Cause hereby moves this Court for leave to file a brief as *amicus curiae* in this case. Counsel for Appellees has consented to the filing of the attached brief, by a letter that has been filed with the Clerk of the Court. The consent of counsel for Appellants was requested but refused.

As set forth in the attached brief at 1-2, Common Cause has a strong interest in the disposition of this ap-

peal and believes that its perspective differs from that of any party. This motion and the attached brief are timely filed in accordance with Rule 36.3 of the Rules of this Court.

Respectfully submitted,

WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel of Record
for Amicus Curiae
Common Cause

August 30, 1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, *et al.*,
Appellants,

v.

RALPH GINGLES, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

---

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

Common Cause is a nonpartisan organization with 250,000 members, a central purpose of which is to further responsible and honest government, accountable in practice as well as in theory to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process. It believes that this case involves extraordinary stakes both for minority voters, who have historically been denied an equal opportunity to participate in that process, and for

democratic institutions generally, which can be truly democratic only if all citizens have equal electoral opportunity. Therefore, Common Cause submits this brief as *amicus curiae* urging affirmance of the decision below.

Common Cause seeks to provide the Court with a perspective on this litigation that differs from that of any party. In the interest of ensuring more reasoned and predictable identification of violations of Section 2 of the Voting Rights Act, it attempts herein to develop a framework that will aid the Court in appreciating the interrelationships between and the significance of the factors identified in the Senate Report on the 1982 amendment to that Act.

Section 2 embodies Congress' determination to compensate for the diminishment of the voting strength of racial minorities caused by prior intentional discrimination. To that end, it prohibits not merely electoral schemes that bar racial minorities from the political process, but also plans that dilute the group voting strength of a minority. Such dilution occurs whenever an electoral system denies a racial minority an opportunity, proportionate to its share of the population, to elect representatives of its choice. Electoral success can be achieved in two different ways, and it is these two avenues for influencing electoral outcomes to which the Senate Report factors are addressed.

The first avenue is a racial group's exercise of its direct voting strength—its ability, which increases with its share of the population, to influence electoral outcomes regardless of the votes of other groups. An important gauge of impairment of a minority's direct voting strength is whether concentrations of minority voters have been manipulated to dilute the impact of their votes. Such manipulation can take the form of "fracturing" or "packing" in the context of single-member districts, or can result from subsuming concentrations of minority voters into multimember districts.

The second avenue to electoral success is coalition-building: A racial group that lacks a majority in an electoral district may combine its strength with that of other groups to form coalitions capable of electing candidates of the groups' mutual choice. Impairment of a racial group's ability to engage in coalition politics can be discerned most clearly from the presence of racial bloc voting. Other indicia can include race-based electoral appeals, socioeconomic deprivation in the minority community, and underrepresentation of minority-backed candidates in elected positions. The less direct voting strength a minority has, the more successful it must be in aligning itself with other voting blocs to influence elections.

The showing required of a plaintiff under Section 2 should relate to the ultimate issue whether the challenged practice, considered in context, impairs a racial group's ability to pursue these alternative avenues to electoral success. In the case of single-member districts, dilution of the minority's direct voting strength through fracturing or packing normally should violate Section 2 where racial bloc voting or other factors indicate that the minority's ability to engage in coalition politics also is impaired.

Multimember districts inherently dilute a minority's direct voting strength—an effect that is greatest where such a district subsumes a minority concentration sufficient to be a majority in a single-member district. This dilutive effect warrants close scrutiny to ensure that the ability of minorities to build coalitions is not also diminished. In such a situation, any more than *de minimis* racial bloc voting normally should be sufficient to trigger a Section 2 violation.

Under these standards, the findings below amply justify the trial court's conclusion that the practices challenged here violate Section 2.

ARGUMENT

I. THE 1982 AMENDMENT TO THE VOTING RIGHTS ACT EXPRESSED CONGRESS' INTENT TO REMEDY DILUTION OF RACIAL MINORITY VOTING STRENGTH CAUSED BY THE CONTINUING EFFECTS OF PAST DISCRIMINATION.

When Congress in the 1982 Voting Rights Act Extension ("the 1982 Act") extended the effectiveness of Section 2 of the Voting Rights Act,[1] it also changed that section. Congress rejected the implications of the Court's plurality opinion in *City of Mobile v. Bolden*,[2] which Congress viewed as radically altering the constitutional standard for vote dilution cases on which Section 2 originally had been premised.[3] The Senate Report accompanying the 1982 Act explains that, prior to *Bolden*, the Court had held that proof of discriminatory intent was not necessary in a vote dilution case.[4] The plurality in *Bolden* had overruled that position, concluding that the Constitution forbids only intentional dilution of a racial minority's voting power.[5] In response, Congress amended Section 2 to provide that a violation of the Act is established

> "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial minority] . . . in that its members have less opportunity than other members of the electorate

[1] Pub. L. 97-205 § 3, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973(b) (1982)), *amending* Pub. L. 89-110, 79 Stat. 437 (1965).

[2] 446 U.S. 55 (1980).

[3] S. Rep. No. 417, 97th Cong., 2d Sess. 19 (1982).

[4] *Id.* at 24-25.

[5] *Id.* at 24. The plurality further found that Section 2 of the Voting Rights Act was coextensive with the Constitution in this respect. *City of Mobile v. Bolden*, 446 U.S. at 60-61.

> to participate in the political process and to elect representatives of their choice." [6]

Congress thus removed any doubt that Section 2 is intended to prohibit discriminatory results as well as discriminatory intent.[7]

Congress viewed this amendment as essential to achieving its primary goal, which was to compensate for the diminishing effect of prior purposeful discrimination on the voting strength of racial minorities.[8] Because "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination," [9] Congress found it necessary to go beyond prohibiting intentional discrimination in order best to redress the continuing effect of prior wrongs. Section 2 as amended seeks to eradicate any vestiges of prior discrimination still reflected in current electoral structures. Therefore, a plaintiff seeking to establish a violation does

[6] 42 U.S.C. § 1973(b) (1982). Congress further prescribed that: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

[7] "Plaintiffs must either prove such [discriminatory] intent, or alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. Rep. No. 417, *supra* note 3, at 27; *see also id.* at 2, 10, 40; H.R. Rep. No. 227, 97th Cong., 1st Sess. 2, 31 (1982).

[8] *See Jones v. City of Lubbock*, 727 F.2d 364, 374-75 (5th Cir. 1984); *Major v. Treen*, 574 F. Supp. 325, 343 (E.D. La. 1983). Indeed, the Senate Report explains that this remedial goal also was the prime motivation behind the original passage of the Voting Rights Act of 1965. S. Rep. No. 417, *supra* note 3, at 5 (quoting statement of Sen. Jacob Javits, 111 Cong. Rec. 8295 (1965)).

[9] S. Rep. No. 417, *supra* note 3, at 40; *see* H.R. Rep. No. 227, *supra* note 7, at 31. Congress also noted the difficulty of proving intentional discrimination. H.R. Rep. No. 227, *supra* at 31; S. Rep. No. 417, *supra* at 10, 40.

not have to show that the adoption of the challenged practice itself caused the dilution of voting strength.[10] The practice is unlawful if it contributes to the perpetuation of that dilution.

The legislative history indicates that Congress wished to incorporate into the statute the pre-*Bolden* caselaw to guide courts in identifying Section 2 violations.[11] That caselaw had applied a "totality of circumstances" test that took into account a number of factors relevant to the nature of the challenged practice and the context in which it operated.[12] The legislative history makes clear, however, that there is "no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," [13] and recognizes that certain factors may be more relevant than others in

---

[10] *See generally* Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 Yale L.J. 189, 200-01 (1984).

[11] *See* S. Rep. No. 417, *supra* note 3, at 32; *see also id.* at 15; H.R. Rep. No. 227, *supra* note 7, at 29-30.

[12] As an interpretive aid, the Senate Report enumerates a number of typical objective factors, largely identified in *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd. on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), to guide courts in analyzing the discriminatory nature of an election system. Those factors include: a history of official discrimination against minority voters; the presence of racial polarization or racial appeals in elections; exclusion of the minority from any candidate slating process; creation of unusually large election districts; adoption of majority vote requirements, anti-singleshot provisions, or other similar restrictions; socioeconomic deprivation in the minority community resulting from past discrimination; and underrepresentation of the minority among elected officials. In addition, the Report notes that a lack of responsiveness by elected officials to the needs of the minority or reliance on a tenuous policy to justify the State's use of the challenged practice may have some probative value. S. Rep. No. 417, *supra* note 3, at 28-29.

[13] *Id.* at 29.

a particular context.[14] In addition, "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." [15]

II. SECTION TWO'S ASSURANCE OF EQUAL "OPPORTUNITY" FOR RACIAL MINORITIES TO "ELECT REPRESENTATIVES OF THEIR CHOICE" REQUIRES CONSIDERATION OF A GROUP'S DIRECT VOTING STRENGTH AND OF ITS ABILITY TO PARTICIPATE EFFECTIVELY IN COALITION POLITICS.

A. Section Two Is Designed to Protect the Voting Strength of Minorities as a Group.

Appellants and the United States suggest that Section 2 creates a right *only* to the "opportunity to meaningfully participate in the political process." [16] They conclude that the statute protects only "equal access" to election machinery.[17] That assertion, rooted in the notion of individual access to the polling booth, ignores Section 2's additional guarantee to minorities of the "opportunity . . . to elect candidates of their choice" [18] and disregards the group nature of voting rights as recognized by this Court and by Congress.

The power to elect representatives is by its nature a group power, since no individual voter can achieve his or her objective unless joined by others supporting the

---

[14] *Id.*

[15] *Id.*; *see, e.g., McMillan v. Escambia County*, 748 F.2d 1037, 1043 (5th Cir. 1984); *United States v. Dallas County Commission*, 739 F.2d 1529, 1534 n.2 (11th Cir. 1984).

[16] Brief for Appellants at 16; *see* Brief for United States at 14.

[17] *See* Brief for Appellants at 18; Brief for United States at 14-15.

[18] U.S.C. § 1973(b) (1982); *see supra* text at note 6.

same candidates.[19] Voting rights can, of course, be abridged by rules that prevent individuals from exercising the franchise. But they can be abridged also by electoral schemes that, in practice, dilute the collective weight given to the votes of members of a disfavored group. The Court has long recognized this group nature of voting rights, noting in *Reynolds v. Sims* that "federally protected [voting] right[s] suffer[] substantial dilution . . . [where a] favored group has full voting strength . . . [and t]he groups not in favor have their votes discounted." [20]

Congress in amending Section 2 made evident its concern about the diminution of the group voting strength of racial minorities. As the Senate Report explained, "discriminatory election systems . . . [that] minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, just as much as outright denial of access to the ballot box." [21]

It is precisely this concept of dilution of group voting strength that underlay the trial court's characterization

---

[19] *See* Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 691 (1982); Note, *supra* note 10, at 198.

[20] 377 U.S. 533, 555 n.29 (1964). The Court has used a group-oriented focus when adjudicating claims of malapportionment and gerrymandering. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring); *id.* at 765 (White, J., dissenting); *id.* at 784 (Powell, J., dissenting); *Gaffney v. Cummings*, 412 U.S. 735, 751, 754 (1973); *White v. Regester*, 412 U.S. 755, 765-70 (1973).

[21] S. Rep. No. 417, *supra* note 3, at 28; *see also id.* at 30 n.120; *United States v. Marengo County Commission*, 731 F.2d 1546, 1556 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *Wesley v. Collins*, 605 F. Supp. 802, 807-08 (M.D. Tenn. 1985); Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 761-63 (1983).

of the appropriate inquiry under Section 2—whether "a racial minority . . . is effectively denied the political power . . . that numbers alone would presumptively . . . give it in a voting constituency not racially polarized in its voting behavior." [22] Appellants incorrectly characterize this "definition" as one that guarantees the outcome of the political process rather than the opportunity to participate in that process.[23] To the contrary, the trial court's formulation does not guarantee electoral outcomes, but properly seeks to discern, from objective factors, whether minorities have an equal opportunity to participate in the electoral process and to elect candidates of their choice.

B. The Factors Identified in the Legislative History Address the Ability of Racial Minorities to Exercise Direct Voting Strength and to Build Coalitions to Influence Elections in the Absence of Numerical Majorities.

The factors identified in the Senate Report are best considered in an analytical framework that illuminates their relevance to establishing a Section 2 violation. Heretofore, courts have examined these factors somewhat mechanically, without identifying the principles that underlay Congress' inclusion of them as relevant to the statutory inquiry. While the importance of each factor depends on the circumstances of the case, Congress endorsed the factors together as vehicles for assessing whether a racial group has an *opportunity* to elect representatives of its choice commensurate with its demographic strength.[24] The opportunity of a group to influence

---

[22] Dist. Ct. Op., 590 F. Supp. 345, 355 (E.D.N.C. 1984), *reprinted in* Jurisdictional Statement (J.S.) at 14a.

[23] Brief for Appellants at 19-20.

[24] Given the different sizes of racial groups, "equal" electoral opportunity necessarily means opportunity commensurate with a group's voting strength. This does not mean commensurate representation, but rather commensurate ability to affect electoral outcomes. *See infra* text at notes 42-48.

electoral outcomes arises through two avenues, and it is to these two sources of electoral success that the factors listed in the Senate Report are addressed.

First and foremost, a racial group has a capacity, which increases with its share of the voting age population, directly to affect electoral outcomes by virtue of its own solidarity.[25] A group that constitutes a majority in a district has the capacity directly to determine an election, without regard to the votes cast by other groups. Such direct voting strength, however, can be diluted by electoral structures and practices that intentionally or inadvertently advantage some racial groups over others.

Second, if a racial group lacks the numerical strength directly to decide an election, it may nonetheless combine its strength with that of other groups to build more or less formal coalitions capable of electing candidates of the groups' mutual choice.[26] The greater a group's numerical strength, the less it must rely on aligning itself with other minorities in order to influence electoral outcomes. Here too, however, the electoral structure and the political and social context in which it operates can reduce the ability of a racial minority effectively to build such coalitions.

Several of the factors identified in the Senate Report are aimed at the first consideration—direct voting strength. A state's use of practices such as unusually large election districts and anti-singleshot provisions is

[25] A group's share of the *total* population of a district is not an accurate measure of its ability to influence electoral outcomes. This Court and lower federal courts have recognized that, because certain minority groups have a generally younger population and hence a smaller proportion of eligible voters, raw population figures may overestimate their voting strength. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 186 n.22 (1980); *Ketchum v. Byrne*, 740 F.2d 1398, 1412-13 (7th Cir. 1984), *cert. denied sub nom. City Council v. Ketchum*, 105 S. Ct. 2673 (1985).

[26] R. Dahl, *Who Governs?* 249-50 (1974).

likely to reduce the direct voting strength of racial minorities.[27] Similarly, if a minority has been denied access to the candidate slating process preceding an election, its ability to exercise its numerical voting strength is diluted by virtue of its lack of a voice in determining what candidates will be put before the electorate. A strong history of voting discrimination in an area also may result in decreased voter registration and turnout today, because of lingering voter frustration and diminished perceived legitimacy of the electoral process.[28]

Other factors enumerated in the Senate Report shed light on whether racial minorities have the ability to build political coalitions in order to affect electoral outcomes. Of foremost relevance is the extent to which voting patterns in elections are racially polarized. Coalition politics presumes that groups are willing to combine forces with other groups having compatible (or at least not antithetical) goals or interests in order to elect candidates. But, where racial bloc voting exists, other numerical minorities resist forming coalitions with a racial minority solely because of its race and without regard to the political expediencies that otherwise underlie coalition-building decisions. For example, groups that share economic or other interests with blacks may nonetheless engage in coalition-building only with whites for racial reasons, thereby precluding blacks from fairly and equally participating in the election process.

For similar reasons, the fact that election rhetoric is based on racial appeals provides strong evidence that a racial minority does not have an equal opportunity to

[27] For a discussion of the implications of such mechanisms, *see infra* text at notes 54-55.

[28] This factor may be relevant as well to the ability of a minority group to participate effectively in coalition politics.

participate in coalition politics. And socioeconomic deprivation in the minority community, stemming from past discrimination, can have a similar significance, because it leads to depressed levels of political participation.[29] A disparity of socioeconomic status also may engender a lack of political savvy and a political agenda not shared by other groups, the latter making it less likely that the other groups will have cause to join forces with the racial minority. A lack of success by minority-backed candidates also may provide strong, quantitative evidence that minorities have not successfully participated in coalition-building. Finally, unresponsiveness of elected officials to the needs of the minority may be evidence of the same thing.[30]

---

[29] *See, e.g., White v. Regester*, 412 U.S. at 768; *United States v. Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977). "[P]laintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." S. Rep. No. 417, *supra* note 3, at 29 n.114.

[30] However, this factor is relevant principally to the existence of intentional discrimination. *See Rogers v. Lodge*, 458 U.S. 613, 625 (1982); *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984). It thus has little importance in suits alleging discriminatory results under Section 2. The Senate Report states that "[u]nresponsiveness is not an essential part of plaintiff's case" and that "defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process." S. Rep. No. 417, *supra* note 3, at 29 n. 116.

One of the factors listed in the Senate Report—whether the policy underlying the use of a standard or practice is tenuous—also appears to be an indirect measure of intentional discrimination. *See Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1479 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir. 1984).

III. THE LAWFULNESS OF A CHALLENGED PRACTICE SHOULD BE DETERMINED ON THE BASIS OF ITS IMPLICATIONS FOR THESE TWO MEANS OF INFLUENCING ELECTORAL OUTCOMES.

Appreciation of these two avenues for influencing electoral outcomes—direct voting strength and the ability to build coalitions—provides a basis for more coherent application of the Senate Report factors and for more reasoned and predictable identification of Section 2 violations. The weight to be given to each factor and, correspondingly, the nature of a plaintiff's required showing, should turn on an evaluation of the manner in which the challenged practice affects a minority's ability to influence electoral outcomes through each of these avenues in the context of the case.

As discussed below, this approach leads to the conclusion, with respect to single-member districts, that a scheme that either "fractures" a racial minority among districts or "packs" it excessively into a few districts violates Section 2 where racial bloc voting is significant or where other factors point to diminished coalition-building power in the minority group. With respect to multimember districts, which inherently dilute the voting power of all minorities, the proposed approach suggests that all such districts should be scrutinized closely to ensure that concentrations of racial minorities are not being foreclosed from enjoying equal electoral opportunity.

A. A Single-Member Districting Scheme That "Fractures" or "Packs" a Racial Group's Direct Voting Strength Should Be Unlawful Unless Other Factors Indicate That the Group Can Participate Effectively in the Coalition-Building Process.

Single-member districts offer an obvious opportunity for local majorities directly to exercise group voting power to elect representatives of their choice. However, the drawing of single district lines can operate, "de-

signedly or otherwise," [31] to reduce artificially the political strength of particular groups of voters.

Voter concentrations can be manipulated either by fracturing—the breaking up of cohesive population concentrations into multiple districts, leaving the members with little effective political influence in any district—or by packing—the drawing of district lines to concentrate a group in a single or a few districts in a proportion greatly exceeding that required to exercise direct voting power, thus reducing the group's political influence in any of the remaining districts.[32]

These mechanisms can minimize the ability of a cohesive group directly to influence electoral outcomes. As the Fifth Circuit noted in *Robinson v. Commissioners Court*:

> "The most crucial and precise instrument of the . . . denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive voting community. . . . This dismemberment of the black community . . . [can] ha[ve] the predictable effect of debilitating the organization and decreasing the participation of black voters in county government." [33]

Indeed, these mechanisms can effectively dilute the voting strength even of a racial group that forms a majority of

---

[31] *Zimmer v. McKeithen*, 485 F.2d at 1304.

[32] *See generally* R. Morrill, *Political Redistricting and Geographic Theory* 14-15, 19-20 (1981); Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *Minority Vote Dilution* 85 (1984); Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 Iowa L. Rev. 1 (1973). The Court has often recognized the dangers of fracturing and packing in the constitutional context. *See, e.g., Burns v. Richardson*, 384 U.S. 73 (1966); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[33] 505 F.2d 674, 679 (5th Cir. 1974). Such district lines "weigh the power of one race more heavily than another." *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., concurring).

the local population.[34] As a result, single-member districting schemes in which a "safe" minority district could have been created but was not, or in which minority group members are packed into a few districts in numbers far greater than necessary to produce "safe" districts, should receive close scrutiny under Section 2.[35]

Since coalition-building is an alternative means of influencing electoral outcomes, the lawfulness of such a scheme may turn on the extent to which the racial minority is able to participate effectively in that process. As noted above, probably the most significant impediment to the ability to build coalitions is the presence of racially polarized voting.[36] The trial court properly identified this factor as the "single most powerful factor in causing racial vote dilution." [37] The presence of racial polarization, however, is necessarily a matter of degree. In some cases, racial bloc voting may be so strong as to shut out entirely any candidate backed by a racial group that is less than a majority of the district's voters; [38] in others,

---

[34] For example, if a State contained 100 voters, 67 black and 33 white, a five-district system could in theory be gerrymandered such that white voters would outnumber blacks 11 to 9 in each of three districts while blacks would outnumber whites 20 to 0 in each of the other two. *See generally* Still, *Alternatives to Single-Member Districts*, in *Minority Vote Dilution* 249 (1984).

[35] *See Kirksey v. Board of Supervisors*, 554 F.2d 139, 149 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977); *Ketchum v. Byrne*, 740 F.2d 1398, 1405 (7th Cir. 1984), *cert. denied sub nom. City Council v. Ketchum*, 105 S. Ct. 2673 (1985); *Major v. Treen*, 574 F. Supp. 325, 352 (E.D. La. 1983).

[36] *See* Hartman, *supra* note 19, at 695.

[37] Dist. Ct. Op., 590 F. Supp. at 372, J.S. at 47a. *Accord United States v. Marengo County Commission*, 731 F.2d 1546, 1566 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984); *see Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

[38] *See Rogers v. Lodge*, 458 U.S. at 623; *Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir.), *aff'd*, 459 U.S. 801 (1982);

it may impair but not totally eradicate a minority's coalition-building power.[39] Such impairment, where districting has reduced the minority's direct voting strength, may significantly reduce the group's overall ability to achieve its electoral goals.

Fealty to the statutory goal of equal electoral opportunity thus indicates that fracturing or packing of direct voting strength, combined with significant racial bloc voting, normally should trigger a Section 2 violation.[40] Since the greater the reduction in direct voting strength the more coalition-building that is needed to affect electoral outcomes, the degree of racial polarization that a plaintiff must show should decrease as the degree of demographic fragmentation or packing increases.

Even if racial bloc voting is not present to a degree that is significant in this context, other factors may indicate that the opportunity of a group to engage in coalition

---

Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 Yale L.J. 974, 989 (1982).

[39] In the latter situation, the minority is denied an *equal* opportunity to influence electoral outcomes, even though the polarization is not so extreme as to guarantee the defeat of every minority-backed candidate. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 105 n.3 (1980) (Marshall, J., dissenting); Note, *supra* note 10, at 200 n. 67; Note, *supra* note 38, at 991-92.

Appellants thus are wrong in suggesting that racially polarized voting is insignificant under Section 2 unless it consistently prevents minority-backed candidates from winning any elections. *See* Brief for Appellants at 40. If that position were taken literally, the success of a single minority-backed candidate would compel a finding that no cognizable racial bloc voting exists. But such a single success obviously does not foreclose a conclusion that racial polarization has *impaired* the minority's coalition-building power. Congress' awareness that the ability to influence elections is a matter of degree is plain from its articulation of the "extent" of success of minority candidates as one of the factors under Section 2. *See* S. Rep. No. 417, *supra* note 3, at 28-29.

[40] *See Kirksey v. Board of Supervisors*, 554 F.2d 139, 151 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

politics—and thereby to affect electoral outcomes—is impaired. For example, if blacks continue to suffer serious socioeconomic effects from past discrimination, or if elections are marked by race-based appeals, those factors may establish that blacks are unable to form coalitions that will influence electoral outcomes.[41]

One further type of relevant evidence obviously is a lack of success in electing minority candidates or others endorsed by the minority community. The greater the disparity between the proportion of such elected officials and the minority's share of the population, the stronger the inference that the minority does not effectively participate in the coalition-building process.[42] Consideration of electoral outcomes as *evidence* of the inability of a racial minority to build coalitions, of course, does not amount to the creation of a statutory right to proportional representation. Congress made clear that outcomes are a relevant consideration in identifying Section 2 violations.[43]

At the same time, it is clear also that the "election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote.'"[44] Appellants' suggestion that recent electoral successes by blacks bar a finding of unequal opportunity[45] thus cannot be correct. The races of successful candidates are only one piece of evidence of a racial minority's opportunity to influence electoral outcomes. Just as victories by white candidates

---

[41] *See supra* text preceding note 29.

[42] *See White v. Register*, 412 U.S. 755, 766-69 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976); *see also NAACP v. Gadsden County School Board*, 691 F.2d 978 (11th Cir. 1982); Note, *supra* note 10, at 205.

[43] *See supra* note 6.

[44] S. Rep. No. 417, *supra* note 3, at 29 n. 115, *quoting Zimmer v. McKeithen*, 485 F.2d at 1307.

[45] *See* Brief for Appellants at 24.

may, in light of all other evidence, be consistent with a finding that blacks enjoy equal voting power, victories by particular black candidates may be consistent with a finding that blacks' opportunity to affect electoral outcomes is diluted. A black candidate's success at the polls may be explained by a variety of factors.[46] Failure to elect a proportionate number of representatives does not in itself trigger a finding of a statutory violation;[47] and some measure of success in a particular election does not bar such a finding.[48]

B. Multimember Districts That Subsume Large Minority Populations Dilute the Direct Voting Power of Such Groups and Should Be Closely Scrutinized.

1. *Multimember Districts Inherently Dilute the Direct Voting Strength of Minorities.*

The creation of a multimember or at-large district tends to reduce the direct voting strength of a racial (or any other) minority subsumed within the district, particularly where the group could have constituted a majority in one or more of the single districts that could have been created in lieu of the multimember one. Multimem-

[46] For example, white politicians may find it expedient to support a "token" minority representative whose views they find acceptable. *See* Avila, *Mobile Evidentiary Analysis*, in *The Right to Vote* 125, 133 (Rockefeller Foundation Conf. Rep. 1981); Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 Fla. St. U.L. Rev. 85 (1979). Or they may even support a minority candidate in order to thwart a legal challenge to the electoral scheme on dilution grounds. *See Zimmer v. McKeithen*, 485 F.2d at 1307. The latter possibility is especially likely where, as here, the electoral scheme was challenged prior to the recent successes of the minority candidates. *See* Dist. Ct. Op., 590 F. Supp. at 367 n.27, J.S. at 37a n.27.

[47] See *supra* note 6.

[48] Electoral successes commensurate with a minority's share of the population over a significant period of time might, of course, constitute substantial evidence that the group enjoys equal electoral opportunity, depending on the other facts of the case.

ber districts, though not unlawful *per se* under Section 2,[49] thus require close scrutiny under that section.

In an at-large system, a majority of the population of the district controls the election of each of the at-large legislators. The Court has recognized on numerous occasions that such a "winner-take-all" voting system by definition denies to every numerical minority the proportionate direct voting power it could have in single-member districts. In *Rogers v. Lodge*, the Court explained:

> "At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts." [50]

Congress also recognized the inherent dilutive effect of multimember districts in enacting the 1982 Act.[51]

[49] H.R. Rep. No. 227, *supra* note 7, at 30; S. Rep. No. 417, *supra* note 3, at 23-24, 27. In so concluding, Congress appears to have followed several Supreme Court cases that had declined to hold at-large districting unconstitutional *per se*. *See White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *Fortson v. Dorsey*, 379 U.S. 433, 438-39 (1965); *see also Zimmer v. McKeithen*, 485 F.2d at 1304. Those cases, of course, leave open the possibility that an at-large district may be unconstitutional where it operates under the circumstances to dilute the voting strength of racial minorities.

[50] 458 U.S. 613, 616 (1982) (emphasis in original); *see also City of Mobile v. Bolden*, 446 U.S. 55, 65-66 (1980) (plurality opinion); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Whitcomb v. Chavis*, 403 U.S. 124, 158-59 (1971); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984). *See generally* Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353 (1976); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. Pa. L. Rev. 666 (1972).

[51] The House Report explains that "at-large elections are one of the most effective methods of diluting minority [voting] strength

Multimember districting also tends to dilute the voting strength of racial minorities in more subtle ways. For example, it contributes to the election of representatives lacking close ties to the voters in particular communities; hence, identifiable constituencies have no one member specifically charged with representing their interests.[52] At-large systems also contribute to voter confusion, because ballots in such systems necessarily are more bulky and difficult to comprehend.[53]

The dilutive effects of multimember districts can be magnified or reduced by a state's adoption of certain structural features. Some of those features—identified in the legislative history of the 1982 Act [54]—can strip away further a minority's opportunity to influence elections. For example, a majority-win rule, requiring a runoff if no candidate receives more than half of the votes cast, may, in some instances, prevent a minority candidate from winning where the majority vote is split between two majority candidates. Numbered post provisions, allowing each voter to vote for only one candidate for each numbered seat, prevent a minority from concentrating its votes to take advantage of a split among majority group voters. Anti-singleshot voting provisions, too, by requir-

---

in the covered jurisdictions," H.R. Rep. No. 227, *supra* note 7, at 18, and acknowledges that "numerous empirical studies based on data collected from many communities have found a strong link between at-large elections and lack of minority representation." *Id.* at 30.

[52] This effect is heightened if the scheme lacks any requirement that members come from each of the implicit wards within the at-large scheme. *See White v. Regester*, 412 U.S. 755, 766 n.10 (1973); *Zimmer v. McKeithen*, 485 F.2d at 1305.

[53] *See, e.g., Connor v. Finch*, 431 U.S. 407, 415 (1977); *Chapman v. Meier*, 420 U.S. 1, 15 (1975); *Wallace v. House*, 515 F.2d 619, 627 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976).

[54] *See supra* note 12; *see also* H.R. Rep. No. 227, *supra* note 7, at 30; S. Rep. No. 417, *supra* note 3, at 29.

ing each voter to cast a ballot for as many candidates as there are offices to be filled, prevent targeted voting, forcing racial minorities to vote for white candidates where the number of open seats exceeds the number of minority candidates. Finally, an election scheme under which the terms of offices are staggered minimizes the potential for vote-splitting among the majority group by making fewer seats open at any time.[55]

On the other hand, other structural features can compensate for the naturally dilutive effects of an at-large system. These include cumulative voting [56] and limited voting procedures.[57] Or a state can take a hybrid approach by superimposing an at-large scheme on top of a system of single-member districts, so that some repre-

---

[55] This Court and commentators have emphasized the inherently dilutive character of each of these structural provisions. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 627 (1982); *City of Rome v. United States*, 446 U.S. 156, 184 n.20 (1980); *White v. Regester*, 412 U.S. 755, 756 (1973); *Zimmer v. McKeithen*, 485 F.2d at 1305; Davidson, *Minority Vote Dilution*, in *Minority Vote Dilution* 6-7 (1984); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353, 358-59 (1976); Derfner, *Racial Discrimination and The Right to Vote*, 26 Vand. L. Rev. 523, 553 n.125 (1973); Howard and Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1658-59 n.184 (1983); Note, *supra* note 38, at 993-94.

[56] With cumulative voting, voters in multimember districts are permitted to cast multiple votes for a single preferred candidate. By enabling minority groups to concentrate their votes on a single or a few minority candidates, cumulative voting enhances minority voting strength. *See, e.g., United States v. Marengo County Commission*, 731 F.2d 1546, 1560 n.24 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); R. Dixon, *Democratic Representation* 523-25 (1968); E. Lakeman, *How Democracies Vote* 87-91 (1974).

[57] Under a limited voting procedure, citizens are given fewer votes than the number of offices to be filled, minimizing the "winner-take-all" bias inherent in multimember systems. *See, e.g., United States v. Marengo County Commission*, 731 F.2d at 1560 n.24; R. Dixon, *supra* note 56, at 521-23.

sentatives are elected according to each method.[58] The use of such procedures, under appropriate circumstances, enables states to "retain the perceived benefits of at-large representation while providing opportunities for effective minority participation." [59] Where these compensatory mechanisms are present, a multimember scheme may give minorities an effective opportunity to exercise their direct voting strength. However, absent such mechanisms—and particularly if additional features exacerbating dilutive effects are present—multimember districts should be regarded as inherently suspect under Section 2.[60]

2. *The Need for Proof of Racial Polarization or Other Factors Impairing a Minority's Ability to Build Coalitions Should Be Less Where Concentrations of Minority Voters are Subsumed in Multimember Districts.*

The dilution of a minority's direct voting strength by multimember districts necessitates greater success in co-

[58] *See City of Mobile v. Bolden*, 446 U.S. 55, 82 (1980) (Blackmun, J., concurring); *United States v. Marengo County Commission*, 731 F.2d at 1560 n.24; *NAACP, Inc. v. City of Statesville*, 606 F. Supp. 569 (W.D.N.C. 1985); *James v. City of Sarasota*, No. 79-1031-Civ-T-GC (D.C. Fla. Jan. 25, 1985).

[59] *United States v. Marengo County Commission*, 731 F.2d at 1560 n.24.

[60] In certain limited instances, replacing an at-large system with a single-member scheme might dilute minority voting strength even further. If a racial group is very small or its members are spread relatively evenly throughout the area, then no single-districting scheme can be established that will enable the group to exert a strong political influence even in one district within a single-member scheme. *See, e.g., Dove v. Moore*, 539 F.2d 1152, 1155 n.4 (8th Cir. 1976); *Zimmer v. McKeithen*, 485 F.2d at 1308. In other rare instances, the use of a multimember scheme may be constitutionally compelled by the one-person-one-vote requirement. *See id.* at 1308. However, absent these unusual situations, the preference for "safe" single-member districts over multimember districts reflects Congress' "political judgment," Dist. Ct. Op., 590 F. Supp. at 357, J.S. at 18a, as to the most appropriate vehicle for identifying and eliminating the vestiges of racial discrimination.

alition-building if a racial minority is to influence election outcomes. As a result, any racial bloc voting will be especially destructive of a minority's opportunity to elect representatives of its choice. Thus, the amount of racial polarization necessary to warrant a conclusion that a group's ability to participate in coalition politics is impaired should be even less than would be required in the context of single-member districts.

Indeed, where a concentrated population of minority voters has its direct voting strength diluted through submergence in a multimember district, and where elections in that district have not produced success by minority candidates commensurate with the minority's demographic strength, any evidence of more than *de minimis* racial bloc voting normally should suffice to show a Section 2 violation. The same should be true with respect to other factors evidencing impairment of a minority's opportunity to engage in coalition politics.[61]

IV. APPLYING THESE PRINCIPLES, THE COURT SHOULD AFFIRM THE JUDGMENT BELOW.

When the trial court's findings of fact are considered in relation to the statutory framework described above, it is clear that blacks in each of the challenged multimember districts do not enjoy equal electoral opportunity.[62] The court based its findings on an "intensely local

[61] *See, e.g., United States v. Marengo County Commission*, 731 F.2d 1546, 1566 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *Wesley v. Collins*, 605 F. Supp. 802, 812 (M.D. Tenn. 1985); *supra* text at notes 41-42.

[62] We do not understand that there remains any issue concerning the lawfulness of Senate District No. 2, a single-member district. *Accord Brief for United States* at 7 n.11. We thus do not discuss that district, except to note that the trial court's findings of fracturing in that district and of "severe and persistent racial polarization in voting," Dist. Ct. Op., 590 F. Supp. at 358, 372, J.S. at 20a-21a, 46a, provide ample basis for its holding that the district violates Section 2.

appraisal" [63] of the structure and operation of the challenged schemes. The findings firmly establish that blacks in these districts are foreclosed from employing direct voting strength and hampered in their ability to engage in coalition politics.

There can be no doubt that blacks are denied an equal opportunity to exercise their direct voting strength to achieve electoral success. The court found that concentrations of blacks within the boundaries of each of the challenged districts were sufficient to constitute majorities in single districts, which would have enabled them to elect candidates through their own solidarity.[64] The submergence of these black concentrations instead into large multimember districts in which blacks are relatively small minorities [65] greatly diluted blacks' direct voting strength. Moreover, the level of political participation by black citizens was significantly depressed as a result of discrimination in prior elections.[66] The resulting registration gap between blacks and whites even further diminished the direct voting strength of the black population.

In addition, the challenged schemes contain features that exacerbate the inherently dilutive effect of these multimember districts. First, the trial court found that North Carolina's majority-vote requirement for all primary elections under the circumstances presents an "ongoing impediment to any cohesive voting minority's op-

[63] *White v. Regester*, 412 U.S. 755, 769 (1973).

[64] Had single districts been created, blacks would have constituted majorities ranging from 62.7 percent in House District No. 8 to 71.2 percent in House District No. 36. Dist. Ct. Op., 590 F. Supp. at 357-58, J.S. at 19a-20a.

[65] The percentages of blacks in the total populations of the multimember districts ranged from 21.8 percent in House District No. 21 to 39.5 percent in House District No. 8. The percentages of blacks in the registered-voter populations of these districts ranged from 15.1 to 29.5 percent. *Id.* at 357, J.S. at 19a.

[66] *Id.* at 360-61, J.S. at 24a-26a.

portunity to elect candidates of its choice . . . ." [67] Second, the State's lack of a subdistrict residency requirement [68] enables the elected representatives to come disproportionately from outside the predominantly black neighborhoods of the multimember districts. The dilutive effect of these features is compounded by the fact that the size of these multimember districts is unusually large.[69]

In these circumstances, close scrutiny is necessary to ensure that blacks are capable of engaging in coalition politics in these districts to the extent required to afford them equal electoral opportunity. The trial court's findings amply demonstrate that they are not. After reviewing extensive statistical and direct evidence, the trial court found significant racial polarization in each of the challenged districts.[70] Not only did it find an almost

[67] *Id.* at 363, J.S. at 30a. Contrary to Appellants' claim, it is irrelevant whether a black candidate demonstrably has lost an election because of such structural features. *See* Brief for Appellants at 27-28. Such an argument not only ignores the fact that racial vote dilution can be significant without being absolute, but it fails to consider the interrelationship of such features with other impediments to black electoral success. For example, the trial court noted that the majority-vote requirement is especially harmful where racial polarization exists. *See* Dist. Ct. Op., 590 F. Supp. at 363, J.S. at 30a. It noted also that, in recent years, black candidates for Congress and Lieutenant Governor who led in the first Democratic primary lost in the runoff election mandated by the majority-vote requirement. *Id.*

[68] Dist. Ct. Op., 590 F. Supp at 363, J.S. at 30a.

[69] Tr. at 133 (Testimony of Dr. B. Grofman).

[70] Dist. Ct. Op., 590 F. Supp. at 367-72, J.S. at 38a-46a. In challenging the trial court's finding of racial bloc voting, Appellants and the United States erroneously focus on selective data concerning the percentages of white votes received by a few black candidates. *See* Brief for Appellants at 36-38; Brief for United States at 32-33. That focus, out of context, can be highly misleading. For example, both briefs stress that a black candidate (Berry) received 50 percent and 42 percent of the white vote in the primary and general

unprecedented correlation between the race of voters and the race of the candidates for whom they voted,[71] but white voters consistently exhibited a strong reluctance to vote for black candidates under any circumstances.[72] Such severe racial polarization should be ample, given the dilutive features of these multimember districts and their demographic and historical contexts, to support the trial court's conclusions that the districts violate Section 2.

The trial court's additional findings on the prevalence of subtle racial appeals in election campaigns [73] and on the disadvantaged educational, employment, and health status of blacks stemming from past intentional discrimination [74] buttress this conclusion, as does the court's finding of persistent underrepresentation of black-supported

---

election for House District No. 36 in 1982. The trial court specifically addressed the misleading nature of this statistic, pointing out that in the primary there were only seven white candidates for eight positions so that at least one black *had* to be elected, and that in the general election a solid majority of white voters refused to vote for any black candidates. Dist. Ct. Op., 590 F. Supp. at 369, J.S. at 42a.

[71] Dist. Ct. Op., 590 F. Supp. at 367-68 & n.30, J.S. at 38a-40a & n.30.

[72] For example, the trial court found that white voters almost universally ranked black candidates last or next to last among all candidates, and that most refused to support black candidates in general elections even when they were running against candidates of the party the whites would otherwise oppose or when black incumbents ran uncontested. *Id.* at 368, J.S. at 40a.

[73] *Id.* at 364, J.S. at 31a-32a.

[74] *Id.* at 361-63, J.S. at 26a-29a. The trial court found that these disadvantages resulted in significantly depressed levels of socioeconomic well-being for blacks, giving "rise to special group interests centered upon those factors." *Id.* at 363, J.S. at 29a. This disjunction between the political agenda of blacks and whites significantly reduces the impetus for whites to engage in coalition-building with blacks.

candidates at all levels of government.[75] The court's finding of black underrepresentation was based not on a rule of thumb of "proportional representation," as Appellants suggest,[76] but on the court's analysis of the results of elections held in each challenged district and the electoral contexts that generated those results.[77] Though acknowledging the recent election of a few black candidates, the trial court found compelling reasons to doubt that those results demonstrated equal electoral opportunity,[78] and found the "overall results achieved to date at all levels of elective office . . . minimal in relation to

---

[75] *Id.* at 367, J.S. at 37a.

[76] Brief for Appellants at 19.

[77] Dist. Ct. Op., 590 F. Supp. at 364-66, J.S. at 32a-36a. By selectively focusing on certain races and ignoring the circumstances of those races, Appellants and the United States draw unwarranted inferences about blacks' ability to influence the political process. For example, the United States infers that blacks enjoy equal electoral opportunity in House District No. 23 by virtue of the election of a black member to a three-person House delegation where blacks constitute 36.3 percent of the population. Brief for United States at 22. Such an inference is unsound: The trial court points out that only two white candidates decided to enter the race for three seats. A black candidate therefore had to win. *See* 590 F. Supp. at 368, J.S. at 40a. In addition, the court noted that no black had ever been elected to the Senate from the area comprising District 23, and that only 25 percent of the City Council members are black despite a 47 percent black voting population. *Id.* at 366, J.S. at 35a. The United States also emphasizes that two of five House delegates in District No. 39 are black while blacks constitute only 25 percent of the population, *see* Brief for United States at 20, but ignores the court's additional findings that only one of eight Board of Education members is black, that only one of five City Commissioners is black, and that no blacks have ever been elected to the Senate from that area. *See* Dist. Ct. Op., 590 F. Supp. at 366, J.S. at 35a.

[78] For example, the court concluded that the somewhat higher level of success experienced by black candidates in 1982 compared to previous years likely was caused by the pendency of this very lawsuit, which encouraged white political leaders to support token black candidates in order to forestall success by plaintiffs. *See* Dist. Ct. Op., 590 F. Supp. at 367 n.27, J.S. at 37a n.27.

the percentage of blacks in the total population." [79] These additional findings leave no doubt that blacks in these multimember districts are hindered in engaging in coalition politics, and under the circumstances are being denied equal electoral opportunity.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

WILLIAM T. LAKE
Counsel of Record
ADRIENNE MASTERS
WILMER, CUTLER & PICKERING*
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amicus Curiae
Common Cause

August 30, 1985

---

[79] *Id.*

* Evan Caminker, a summer associate at the law firm of Wilmer, Cutler & Pickering, assisted in the preparation of this brief.